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HOME OWNER WARRANTIES IN NEW JERSEY

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The purpose of this article is to provide a perspective of the existing remedies available to the owner who discovers defects in the new home.

Topics include a look at rights under the common law, federal statutory law, voluntary warranty programs, and a recently enacted New Jersey statute concerning builder registration and warranties.

Caveat Emptor: From Common Law to the Present

Caveat emptor, first appearing in 1534, is slowly giving way to a new doctrine: caveat vendor.[1] Caveat emptor was established firmly by the

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[1] 7 WILLISTON, CONTRACTS § 926 (3rd ed. 1963). Under common law, the doctrine of caveat emptor applies to both real and personal property and provides that in the absence of fraud or misrepresentation, a vendor is responsible for the quality of the property being sold or conveyed by him only to the extent for which he expressly agrees to be responsible. *Id.* Historically, the sale of realty plus a building was treated by the courts as the sale of real estate "with appurtenances." RESTATEMENT (SECOND) OF TORTS § 352. (Reporters' Notes.) An appurtenance is a thing belonging to another or principal thing and which passes as an incident to the principal thing. Annot., 39 A.L.R.2d 872 (1955). Generally in the sale of real estate and building, the buyer and builder/vendor agree orally or in writing as to the terms of the sale and either party has the power to modify the agreement prior to its execution. Long v. Hartwell, 34 N.J.L. 116, 122 (Sup. Ct. 1870). Once the deed is accepted by the purchaser, the prior agreement is void. *Id.* at 122. All preliminary negotiations, including the contract of sale, are merged into the deed. Campbell v. Heller, 36 N.J. Super. 361, 15 A.2d 644 (Ch. Div. 1955). The deed of conveyance is presumed to be the ultimate intent of the parties and to exclude all other terms and liabilities. *Id.* The rights of the parties after the date of the closing are determined by the deed, not by the contract. 34 N.J.L. at 122. The acceptance of the deed raises the presumption that the purchaser agreed to take title at his own risk and had the deed been faulty as to its terms, the purchaser would have rejected it. Smith v. Colonial Woodworking Co., 110 N.J.Eq. 418, 160 A. 351 (E. & A. 1932).

seventeenth century.[2] In America, the doctrine became rooted a century after independence was declared.[3]

The expression "caveat emptor," literally meaning "let the buyer beware,"[4] is a common law maxim expressing the rule that the buyer purchases at his peril.[5] It includes sales of personal property and sales of real estate concerning easily observable property conditions.[6] Caveat emptor was born in an era when buyers and sellers dealt at arms length and occupied an equal bargaining position.[7] The parties usually had equal opportunity to gather information and to bargain on the property.[8]

In 1931, the English courts gave the first indication of re-evaluation of caveat emptor respecting real property in *Miller v. Cannon Hill Estates*.[9] In *Miller*, the plaintiff purchased a home which was in the process of construction. Upon completion, structural flaws were discovered. The court held that when a buyer purchases a home in the course of construction, he relies on the builder to complete the dwelling in a workmanlike manner.[10] This is distinguishable from the purchaser of a completed home in that the latter has the ability to inspect the finished product before he accepts it.[11]

Despite the *Miller* decision and a decision by the United States Supreme Court[12] in 1884 which held that there was an implied warranty of quality

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[2] Nielsen, *Caveat Emptor in Sales of Real Property—Time For a Reappraisal*, 10 ARIZ. L. REV. 484, 484 (1968).

[3] Barnard v. Kellogg, 77 U.S. 383 (1870), as quoted in Nielsen, *Caveat Emptor in Sales of Real Property—Time For a Reappraisal*, 10 ARIZ. L. REV. 484 (1968).

[4] BALLENTINE'S LAW DICTIONARY 183 (1969).

[5] *Id.*

[6] *Id.*

[7] Nielsen, *Caveat Emptor in Sales of Real Property—Time For a Reappraisal*, 10 ARIZ. L. REV. 484, 490 (1968).

[8] *Id.* at 491.

[9] [1931] 2 K.B. 113, 120. In 1937, the English Court of Appeals expressly followed the *Miller* dictum and held that in the sale of a house under construction there is an implied warranty that the house will be finished in a workmanlike manner. Perry v. Sharon Development Co., [1937] 4 All E.R. 390 (C.A.) *as quoted in* Murray, *Under the Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 FORDHAM L. REV. 453 (1970).

One of the first New Jersey cases to tamper with the caveat emptor doctrine was Minemount Realty Co. v. Ballentine, 111 N.J. Eq. 398, 162 A. 594 (Sup. Ct. 1932). The bill was brought by the vendor of the real estate for specific performance. The property consisted of a house, a lot, and a garage which was not erected at the time the contract was signed. The material defects discovered by the purchaser consisted of an insufficient and crumbling concrete floor in the garage. The court held that where a party contracts to build for a specific purpose, the law reads into the contract a stipulation that the building shall be erected in a reasonably good and workmanlike manner and when completed shall be reasonably fit for the intended purpose. *Id.* at 399, 162 A. at 594.

[10] Miller v. Cannon Hill Estates, [1931] 2 K.B. 113.

[11] *Id.* at 120.

[12] Kellogg Bridge Co. v. Hamilton, 110 U.S. 108 (1884).

in the work done by a contractor in constructing a bridge,[13] the majority view in the United States was that there were no implied warranties. Caveat emptor began to fade with respect to the sale of chattels both in case law and by statute in the early 1950's when five states adopted the Uniform Commercial Code (UCC).[14] The UCC was adopted by forty-six states between the years 1961 and 1968.[15] The primary focus of section two of the UCC is transactions in goods. Section 2-314 provides that "[U]nless excluded or modified (§ 2-316) a warranty that the goods shall be merchantable is implied in a contract for their sale if seller is a merchant with respect to goods of that kind." UCC § 2-105(1) defines goods as "based on the concept of movability. . . . It is not intended to deal with things which are not fairly identifiable as movables before the contract is performed." While the definition of goods under UCC § 2-105(1) excludes homes, an analogy can be drawn between a builder/vendor who may be categorized as a regular merchant with respect to homes and a seller of chattels who may be categorized as a regular merchant of chattels. Real property sale situations are nearly identical to that envisioned by UCC § 2-314. Further, the UCC § 2-315 states that

> [W]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified under the next section, an implied warranty that the goods shall be fit for such purpose.

In most instances, the builder/vendor knows that a buyer is purchasing a house for the purpose of habitation. Where this is the case, applying § 2-315 to the sale would require the dwelling to be fit for habitation. The

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[13] *Id.* Kellogg partially completed a bridge and subcontracted to Hamilton the balance of the contract to complete the bridge. The work done by Kellogg was faulty and Hamilton incurred additional expense to correct Kellogg's work and complete the bridge. The court said:

> The law, therefore, implies a warranty that this false work was reasonably suitable for such use as was contemplated by both parties. It was constructed for a particular purpose, and was sold to accomplish that purpose; and it is intrinsically just that the company, which held itself out as possessing the requisite skill to do work of that kind, and therefore as having special knowledge of its own workmanship should be held to indemnify its vendee against latent defects, arising from the mode of construction, and which the latter, as the company well knew, could not, by any inspection, discover for himself.

Id. at 119.

[14] U.C.C. Table 1, at 5 (Supp. 1970).

[15] *Id.*

courts, finding inconsistency in the existence of an implied warranty in the sale of goods but not in the sale of real property, changed direction. The court in *Moore v. Werner*[16] said:

> Many of the authorities cited involve personalty, but we see no reason for any distinction between the sale of a new house and the sale of personalty, especially in a suit between the original parties to the contract, one of whom constructed the house in question. It was the seller's duty to perform the work in a good and workmanlike manner and to furnish adequate materials, and failing to do so, we believe the rule of implied warranty of fitness applies.[17]

Since World War II and the post war housing boom,[18] American courts have been wrestling with the inherent inequities of caveat emptor. In his work on *The Nature of the Judicial Process,* Justice Cardozo observed:

> That court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society, and no considerable property rights have become vested in reliance upon the old rule.[19]

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[16] 418 S.W.2d 918 (Tex. Civ. App. 1967).

[17] *Id.* at 923. In Inman v. Binghamton Housing Auth., 1 A.D.2d 559, 152 N.Y.S.2d 79, *rev'd*, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957), the appellate division of the New York supreme court in the course of its opinion expressed the thought that there was no valid reason for any distinction between real and personal property so far as the principle of liability is concerned; that the arguments for and against liability are almost precisely the same in each instance; and that the trend of modern scholarship sustains the view that no cogent reason exists for continuing the distinction.

[18] Tavares v. Horstman, 542 P.2d 1275 (Wyo. Sup. Ct. 1975).

> Since World War II homes have been built in tremendous numbers. There have come into being developer-builders operating on a large scale. Many firms and persons, large and small operators, hold themselves out as skilled in home construction and are in the business of building and selling to individual owners. Developers contract with builders to construct for resale. Building construction by modern methods is complex and intertwined with governmental codes and regulations. The ordinary home buyer is not in a position, by skill or training, to discover defects lurking in the plumbing, the electrical wiring, the structure itself, all of which is usually covered up and not open for inspection.

Id. at 1279.

[19] B. Cardozo, *The Nature of the Judicial Process, quoted in* Dwy v. Connecticut Co., 89 Conn. 74, 99, 92 A. 883, 891 (1915).

New Jersey was the first jurisdiction[20] to assault the caveat emptor rule in the housing industry by introducing the concept of products liability in *Schipper v. Levitt & Son, Inc.*[21] Levitt & Son, Inc., the defendant, was a mass developer of homes in planned communities. The homes were normally sold by using advertised models built to Levitt's specifications. This action arose in Levittown (now Willingboro), New Jersey where Levitt & Sons, Inc. built thousands of homes, including the Kreitzer's home purchased in 1958.[22]

Schipper, the plaintiff, leased the Kreitzer home for one year. Schipper's son was scalded by hot water because the faucet did not contain a temperature regulating valve. The accident occurred one and one-half years after completion of the house.[23] The Supreme Court of New Jersey said:

> In fulfillment of the deliberate design of its system for distributing hot water for domestic use, Levitt assembled the ingredients, including the heating unit from York, and directed their installation. In this respect it was not unlike the manufacturers of automobiles, airplanes, etc., whose products embody parts supplied by others. When their marketed products are defective and cause injury to either immediate or remote users, such manufacturers may be held accountable under ordinary negligence principles *(MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (Ct. App. 1916))* as well as under expanding principles of warranty or strict liability. See *Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358 (1960); Putman v. Erie City Manufacturing Company, 338 F.2d 911 (5 Cir. 1964)*. . . .[24]

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[20] Ohio was the first American jurisdiction to adopt the law pronounced in the *Miller* case, note 9, *supra*. In Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957), the petitioners sought compensation from the builder/vendor for damages caused by the fact that the sewer had failed to carry away the waste material from their single family dwelling. The court stated:

> In establishing the law for this case, we adopt the law pronounced in the English case cited supra. [Miller]. We believe it to be salutary and based upon sound legal reasoning.
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> We conclude by saying that, in the appeal before us, sufficient credible evidence established the fact that the house, when sold, was still in the course of construction and incomplete; and the bargain implied in law between the sellers and the buyers was the completion of the entire house in such a way that it would be reasonably fit for its intended use, and that the work would be done in a reasonably efficient and workmanlike manner.

Id. at 341, 140 N.E.2d at 821. *Miller* and *Vanderschrier* allowed implied warranties only where the sale of the home was made prior to its completion.

[21] 44 N.J. 70, 207 A.2d 314 (1965).

[22] *Id.* at 74, 207 A.2d at 316.

[23] *Id.* at 75, 207 A.2d at 317.

[24] *Id.* at 82, 207 A.2d at 321.

> The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected . . . . We consider that there are no meaningful distinctions between Levitt's mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same.[25]

The *Schipper* decision was important for several reasons:

> First, it unequivocally recognized the existence of an implied warranty in real estate transactions, expressly overruling prior decisions. Second, it imposed privity-free strict liability for personal injuries upon the builder-vendor. Third, it was rendered by a unanimous court.
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> . . . [T]he court pointed out, when a buyer purchases from a development housing producer such as Levitt & Sons, he clearly relies on the skill of the seller, and his implied representation that the house has been erected in a reasonably workmanlike manner and is reasonably fit for habitation. Any inspection the buyer makes will be largely superficial, and the likelihood of his obtaining protective warranties in the conveyancing documents is negligible. So if there is an injury due to a defect in the dwelling, such cost should be borne by the developer-seller, upon whose implied warranties the buyer relied.[26]

The most recent and certainly the most progressive implied warranty case in New Jersey to date is *McDonald v. Mianecki*.[27] The parties entered into a

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[25] *Id.* at 90, 207 A.2d at 325.

[26] Bixby, *Implied Warranty of Habitability: New Right for Home Buyers*, VI CLEARING HOUSE REV. 468, 471 (1972). Before *Schipper*, New Jersey held firm common law doctrines in Sarnicandro v. Lake Developers, Inc., 55 N.J. Super. 475, 151 A.2d 48 (App. Div. 1959). The court held a vendor is immune from liability though the dangerous condition existed at the time of transer of title (improperly constructed steps). In Levy v. C. Young Constr. Co., 46 N.J. Super. 293, 134 A.2d 717 (App. Div. 1957), *aff'd on other grounds*, 26 N.J. 330, 139 A.2d 738 (1958), the court held the vendor/builder was not liable to the purchaser for damages resulting from latent defects (defective sewer line) unless there was evidence of fraud or concealment or unless express warranties had been made. *Schipper* ends vendor immunity.

[27] 79 N.J. 275, 398 A.2d 1283 (1979).

contract whereby the vendors agreed to construct a new residential dwelling for purchasers. There were no express warranties in the deed as to construction, fitness, or habitability. The purchasers moved into the house on November 17, 1972. The well water developed a multitude of problems including staining of fixtures, bad odor and taste, fizzling, and vapor discharge.[28] Finally, the Chief of Potable Water of the New Jersey Department of Environmental Protection, after testing the water, concluded that it did not meet state standards as it contained concentrations of impurities which rendered it hazardous to the health of the consumer and corrosive to the water supply system.[29]

Although the builders argued that they should not be responsible for the lack of potable water as it had nothing to do with substandard construction, the court declared:

> Although we concede that the considerations in favor of an implied warranty do not weigh as strongly in a case such as this, nevertheless we are convinced that of the two parties the burden should fall on the less innocent defendants [builder].[30]

The court, however, left open the possibility of a different result had there been no privity.[31] It further declined to decide if strict liability could have been applied rather than the implied warranty of habitability which was applied.[32] The court did not extend the applicability of implied warranties to the sale of a used house.[33] Importantly, the court did not void disclaimers of implied warranty by the builder-vendor on either public policy grounds or as needing special procedural safeguards.[34]

The holding is not as narrow as it appears at first blush. The warranty does arise "whenever a consumer purchases from an individual who holds himself out as a builder-vendor of new homes—regardless of whether he can be labeled a 'mass producer'."[35] The opinion clearly places on the builder the burden of providing habitable new homes.[36] The court is quick to

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[28] *Id.* at 278-79, 398 A.2d 1284-85.

[29] McDonald v. Mianecki, 159 N.J. Super. 1, 68, 386 A.2d 325, 328-330 (App. Div. 1978).

[30] 79 N.J. at 295, 398 A.2d at 1293.

[31] *Id.* at 295 n.5, 398 A.2d at 1293 n.5.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* at 293-95, 398 A.2d at 1292-93.

[36] *Id.* "The consumer-purchaser should not be subjected to harassment caused by structural defects. He deserves both the focus and concern of the law." *Id.* at 293, 398 A.2d at 1292. "Finally, it is the builder who has introduced the article into the stream of commerce. Should defects materialize, he . . . is the less innocent party." *Id.* at 294, 398 A.2d at 1292.

caution that this holding does not apply to the sale of every new home but to those sales which are "commercial in nature, not casual or personal."[37]

The court also tolled the death-knell for the doctrine of caveat emptor stating that it:

> is an outmoded concept and is hereby replaced by rules which reflect the needs, policies and practices of modern day living . . . . [I]t is necessary that consumers be able to purchase new homes without the fear of being "stuck" with an uninhabitable "lemon." *Caveat emptor* no longer accords with modern day practice and should therefore be relegated to its rightful place in the pages of history.[38]

When litigating their complaints, consumers now have status equal to builder-vendors.

II. *The Developing Federal Role*

The Consumer Product Safety Act[39] set up the Consumer Product Safety Commission to develop safety standards for consumer products and, where possible, to eliminate unreasonable risks of injury associated with these products.[40] Section 2052 of the Act defines consumer products as follows:

> (1) The term "consumer product" means any article or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; but such term does not include —
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> (A) any article which is not customarily produced or distributed for sale to or use or consumption by, or enjoyment of, a consumer. . . .

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[37] *Id.*

[38] *Id.* at 299, 398 A.2d at 1295.

[39] 15 U.S.C. § 2051-81 (1976). (The Consumer Product Safety Commission is hereinafter referred to as CPSC.)

[40] Pursuant to its regulatory authority under 15 U.S.C. § 2054(a) (1976), CPSC collects, analyzes, and publishes information about hazardous products. Under 15 U.S.C. §§ 2056(b), 2058(c)(2)(A) (1976), it may also develop safety standards for consumer products and where "reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product[s]" may promulgate its standards by rule. *Id.* Finally, under 15 U.S.C. § 2064 (1976), it may, after a hearing, declare that a certain consumer product presents a "substantial product hazard."

During 1973, the CPSC began investigations into the aluminum wiring field.[41] On November 4, 1975, the Commission issued a public notice setting forth authorized safety standards it had developed.[42] In January, 1976, Kaiser Aluminum & Chemical Corporation (Kaiser) commenced an action seeking an injunction to prohibit CPSC from disseminating the information about aluminum branch circuit wiring and to require the retraction of information previously published.[43] In addition, Kaiser sought injunctive and declaratory relief against further exercise by CPSC of jurisdiction with respect to aluminum wiring on the grounds that it is not a consumer product under the Consumer Product Safety Act.[44] Kaiser noted that the definition of consumer products excludes nine categories of products including "any article which is not customarily produced or distributed for sale

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[41] Kaiser Alum. & Chem. Corp. v. United States Consumer Prod. Safety Comm'n, 574 F.2d 178, 179-80 (3d Cir. 1978).

> Public hearings were held in March and April, 1974, to determine whether further investigation and eventual regulatory action were warranted. During 1975 CPSC published expressions of concern about potential fire hazards associated with the product. On August 7, 1975, CPSC voted to commence a proceeding to develop a consumer product safety standard, and on November 4, 1975, it published a notice to that effect. 40 Fed. Reg. 51,218 (1975). That notice disclosed CPSC's concern that aluminum branch circuit wiring exposed consumers to several serious hazards, including death or injury caused by burning or asphyxiation.

Id.

[42] Kaiser Alum. & Chem. Corp. v. United States Consumer Prod. Safety Comm'n, 414 F. Supp. 1047, 1051 (D. Del. 1976), 428 F. Supp. 177 (D. Del. 1977), *rev'd*, 574 F.2d 178 (3d Cir. 1978).

> On November 4, 1975 the Commission issued the required public notice of the authorized safety standard development proceeding, in which notice the following statements were made:
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> Prior to August 1974, the Commission had received 165 reports of electrical failures involving aluminum wire. . . .
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> On August 29, 1974, an article discussing the hazards of aluminum wire was published in NEWSDAY, a Long Island, N.Y. newspaper. The article suggested that consumers report electrical problems to the Consumer Product Safety Commission's "hotline". Between August 29 and September 17, the Commission received 404 phone calls from the New York area relating to aluminum wire. 179 calls were from homeowners who had observed danger signals or had electrical malfunctions involving aluminum wire. . . .
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> Hazardous conditions such as burned wire insulation, burned receptacles, fires in receptacles or wall switches, odor of burning wires and smoldering in walls, and electric arcing of switches and receptacles were reported by 96 homeowners. Another 30 homeowners reported symptoms of hazardous conditions such as overheated receptacles and switches, scorched walls, and melted receptacles and wire insulation. 53 callers reported flickering lights or inoperative switches and outlets. The Commission's staff made follow-up investigations of HOT-LINE calls from Medford, N.Y., and confirmed the validity of several reported incidents.

Id.

[43] 414 F. Supp. at 1052.

[44] *Id.*

to or use or consumption by, or enjoyment of, a consumer. . . . "[45] Kaiser stated that aluminum branch circuit wiring falls into the exception because it is an industrial building material, intended for use by electricians, and installed by electricians in buildings.[46]

The district court made a preliminary determination that the CPSC lacked jurisdiction in the area of aluminum branch wiring but refused to grant an injunction because Kaiser had not sufficiently demonstrated that it faced irreparable injury.[47] In a second opinion,[48] the district court held that while aluminum branch circuit wiring is "produced and distributed in part for sale to consumers,"[49] it is not for use by a consumer "in or around" the home and, therefore, the CPSC lacks jurisdiction.[50] The United States Court of Appeals for the Third Circuit reversed the district court[51] and held

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[45] 15 U.S.C. § 2052(a)(1)(A) (1976). *See* H.R. REP. No. 1153, 92d Cong. 2d Sess. 27 (1972) where the House report explained the exclusion as follows:

> It is not intended that true 'industrial products' be included within the ambit of the Product Safety Commission's authority. Thus, your committee has specifically excluded products which are not *customarily* produced or distributed for sale to or use of consumers. The occasional use of industrial products by consumers would not be sufficient to bring the product under the Commission's jurisdiction. The term 'customarily' should not be interpreted as intending strict adherence to a quantum test, however. Your committee is aware that some products which were initially produced or sold solely for industrial application have often become broadly used by consumers. If the manufacturer or distributor of an industrial product fosters or facilitates its sale to or use by consumers, the product may lose its claim for exclusion if a significant number of consumers are thereby exposed to hazards associated with the product.

(Emphasis in original)

[46] 414 F. Supp. at 1059. The response of the Court of Appeals to this position follows:

> Kaiser urges [that] it is an industrial building material intended for use by the electicians who install it in a building. It certainly is that, but once installed it is just as certainly used and enjoyed by householders whenever they turn on an electric switch. That it was first used in a different way by those who erected the building does not negate the plain fact that consumers later use and enjoy it. Kaiser correctly observes that the Act intended a distinction between consumer products such as teapots and razors on the one hand and industrial products on the other. But it would be impossible for a consumer to enjoy the use of an electric razor without also enjoying the use of the branch circuit wiring to which it is connected. Kaiser points out that such a consumer also enjoys the use of the power line in the street and the utility company's electric generator, and so he does. But those articles are not used "in or around" his household, while branch circuit wiring is.

574 F.2d at 180.

[47] 414 F. Supp. 1047, 1063 (D. Del. 1976), 428 F. Supp. 177 (D. Del. 1977), *rev'd*, 574 F.2d 178 (3d Cir. 1978).

[48] Kaiser Alum. & Chem. Corp. v. United States Consumer Prod. Safety Comm'n, 428 F. Supp. 177 (D. Del. 1976), *rev'd*, 574 F.2d 178 (3d Cir. 1978).

[49] 428 F. Supp. at 180.

[50] *Id.* at 181.

[51] 574 F.2d 178, 182 (3d Cir. 1978).

that aluminum branch circuit wiring was produced or distributed for personal use or enjoyment of a consumer in or around a household residence and was a consumer product in the plain language of the Act. Therefore, CPSC had regulatory authority.[52]

This decision significantly enhances the role of the CPSC in the protection of the purchaser of a home and demonstrates the federal government's expanding role in the consumer protection area. This case highlights the court's willingness to hold home builders and their suppliers liable for defects in home construction.

The Magnuson-Moss Warranty/Federal Trade Commission Act[53] was signed into law on January 4, 1975,[54] and took effect six months later.[55] The Act sets forth regulations with which a warrantor,[56] who sells[57] a consumer product[58] and provides the consumer[59] with a written warranty,[60] must comply. The Magnuson-Moss Act represents a congressional decision to

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[52] *Id.* at 181.

> Kaiser established in the district court that although copper branch circuit wiring is customarily distributed through channels which make it readily available for purchase by householders, the aluminum product is significantly less available, since it is sold primarily to electrical wholesalers who sell directly to electrical contractors. The method of distribution chosen by a manufacturer for its product cannot, however, determine whether the product falls within the statutory definition. Either copper and aluminum branch circuit wiring are both consumer products, or neither is. Since both are articles used or enjoyed by consumers in or around households, both are, according to the plain language of the Act, consumer products.

Id.

[53] 15 U.S.C. §§ 2301-12 (1976).

[54] *Id.*

[55] *Id.*

[56] A warrantor is "any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty." 15 U.S.C. § 2301(5) (1976).

[57] A supplier is "any person engaged in the business of making a consumer product directly or indirectly available to consumers." 15 U.S.C. § 2301(4) (1976).

[58] A consumer product is "any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed)." 15 U.S.C. § 2301(1) (1976).

[59] A consumer is defined as:

> [A] buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).

15 U.S.C. § 2301(3) (1976).

[60] A written warranty is defined as follows:

> (A) [A]ny written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material

improve the adequacy of consumer information, prevent consumer deception, and stimulate competition in the marketplace for consumer products.

The Magnuson-Moss Act applies only to written warranties offered on consumer products.[61] New homes are a mixture of consumer products and non-consumer products. The Act does not delineate the boundary between consumer and non-consumer products. The Federal Trade Commission, in an attempt to clarify the meaning of "consumer product" as applied to new homes, issued an advisory opinion to the Home Owners Warranty Corporation and the National Association of Home Builders.[62] This opinion listed

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or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking,

which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

15 U.S.C. § 2301(6) (1976).

[61] 15 U.S.C. § 2302(a) (1976).

[62] FTC News Release, dated December 17, 1976, captioned "FTC Gives Advisory Opinion on Applicability of Warranty Act." The Commission advised that the following separate items of equipment are "consumer products" covered by the Warranty Act when sold as a new home: (a) Heating and Ventilation—boiler, heat pump, electronic air cleaner, exhaust fan, thermostat, space heater, furnace, air conditioning system, humidifier; (b) Mechanical/Electrical—central vacuum system, smoke detector, fire alarm, fire extinguisher, garage door opener, chimes, water pump, intercom, burglar alarm, electric meter, water meter, gas meter, gas or electric barbecue grill; (c) Plumbing—whirlpool bath, garbage disposal, water heater, water softener, sump pump; (d) Appliances—refrigerator, freezer, trash compactor, range, oven, kitchen center, dishwasher, oven hood, clothes washer, clothes dryer, ice maker.

Similarly, the Commission concluded that the following are not consumer products when sold as part of a new home: (a) Heating and Ventilation—radiator, convector, register, duct; (b) Mechanical/Electrical—garage door, electrical switch and outlet, light fixture, electric panel box, fuse, circuit breaker, wiring; (c) Plumbing—sprinkler head, water closet, bidet, lavatory, bathtub, laundry tray, sink, shower stall, plumbing fittings (shower head, faucet, trap, escutcheon, and drain), medicine cabinet; (d) Miscellaneous (including carpeting, linoleum, etc), wall to wall covering, ceiling, vanity, gutter, shingle, chimney and fireplace, fencing.

Finally, the Commission opined that the following separate items of equipment are not consumer products under the Magnuson-Moss Warranty Act when sold as part of a condominium, cooperative or similar multiple-family dwelling, as they are not normally used for "personal, family or household purposes" within the meaning of the Act: fusable fire door closer, TV security monitor, emergency back-up generator, master TV antenna, elevator, institutional trash compactor.

as quoted in Smith, *The Magnuson-Moss Warranty Act: Turning the Tables on Caveat Emptor*, 13 CALIF. WESTERN L. REV. 391, 399 n.46 (1977).

the separate items, in detail, which are "consumer products" when sold as part of a new home.[63] Kenneth G. Peters, in his article *How the Magnuson-Moss Warranty Act Affects the Builder/Seller of New Homes*,[64] cautions that this advisory opinion should not be heavily relied on as it may not be binding in all cases.[65] It is not possible to ascertain with any degree of certainty which items in a new home will be considered "consumer products" and therefore covered by Magnuson-Moss.

The Act provides that a warrantor must designate the warranty he is providing as either full or limited[66] and the designation must appear clearly and conspicuously as a caption or prominent title.[67] A full warranty leaves to the option of the buyer whether to choose refund or complete replacement if the defective items cannot be repaired after reasonable attempts.[68] Full warranty also indicates that the warranty meets the minimum standards set forth in section 2304. If a warranty is not designated as full, it must be designated as limited.[69]

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[63] 574 F.2d 178, 182 (3d Cir. 1978). *See* Peters, *How the Magnuson-Moss Warranty Act Affects the Builder/Seller of New Housing*, 5 REAL ESTATE L.J. 338, 340 (1977).

[64] 5 REAL ESTATE L. J. 338 (1977).

[65] The FTC is expected to issue an advisory opinion which will include a listing of items contained in a new home which it considers consumer products. However, caution may be necessary in relying on this opinion, for three reasons. First, it may not be binding for purposes of civil actions under the Act. Second, under the FTC Rule of Practice 1.3(b), such an opinion bars the FTC from taking action (without prior warning) only against the "requesting party." Since the opinion has been requested by the National Association of Home Builders and Home Owners Warranty Corp., individual builders, especially those having no connection with either organization, may not be "requesting parties" entitled to rely on the opinion for anything more than general guidance. Third, the FTC could state in the opinion that the rule is not all-inclusive.

Id. at 344.

[66] 15 U.S.C. § 2305 (1976).

[67] 16 C.F.R. § 700.6(a) (1978).

[68] 15 U.S.C. § 2304(a)(4) (1976). Under a full warranty, the warrantor must remedy the defect within a reasonable time after notice, without charge. Remedy means the warrantor may elect to repair or to replace the consumer product with a new consumer product which is identical or reasonably equivalent to the warranted product. A warrantor may also refund in full the actual purchase price of the product if (1) repair is not commerically practicable or possible within a reasonable time and the warrantor is unable to provide a replacement or (2) if the consumer is willing to accept a refund in lieu of repair or replacement. If after a reasonable number of attempts to remedy the defect, the product still contains a defect, the warrantor must permit the consumer to elect either a refund for or replacement of the product without charge. A builder who is a member of the Home Owners Warranty Program only issues a limited warranty because the HOW Program reserves for the registered builder the option of repair, replacement or refund of the product he sells. *See* notes 82-105 *infra* and accompanying text.

[69] 15 U.S.C. § 2303(a)(2) (1976). A limited warranty is any warranty which does not meet federal standards for full warranty. *Id.*

The warrantor must disclose "in simple and readily understood language" in a single document thirteen items of information, including the terms and scope of the coverage, the remedies available to the purchaser, and any limitations placed on the purchaser's implied warranty rights.[70] "A new home is obviously a far more complex product than a blender or washing machine, and couching all or even part of a builder's warranty in layman's language may therefore be challenging."[71]

The Warranty Act directs the Federal Trade Commission to prescribe rules requiring that the terms of any written warranty on consumer products be made available to the consumer (or prospective consumer) prior to the sale of the product to him.[72] These rules apply to all warranties either given directly by the warrantor or passed on by the builder in the case of a manufacturer's warranty on appliances which the builder does not warrant himself.[73] The builder must make certain that his warranty, plus all the manufacturers' warranties he passes along, are available for inspection in an area where the customer might look for information about the home, such as a model, a sales office, or the builder's office.[74]

The Act substantially limits the right of a warrantor to disclaim an implied warranty.[75] As can be seen from the implied warranty section of this article, the warranties on most consumer products are controlled by common law or by the Uniform Commercial Code. The courts have been able to apply common law and Uniform Commercial Code principals of implied warranty of merchantibility and of fitness for a particular purpose to protect the purchaser of a new home.[76] The Magnuson-Moss Act allows "nothing in this chapter [to] invalidate or restrict any right or remedy of any con-

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[70] 15 U.S.C. § 2302(a) (1976).

[71] Peters, *How the Magnuson-Moss Warranty Act Affects the Builder/Seller of New Housing*, 5 REAL ESTATE L.J. 338 (1977).

[72] 15 U.S.C. § 2302(b)(1)(A) (1976). Under this rule, sellers (retailers) must make the text of warranties available to prospective buyers, prior to sale, through the use of one or more of the following means: (1) displaying the warranty text in close conjunction to each warranted product; (2) displaying the product in a package disclosing the warranty; (3) placing near the product a notice which discloses the text of the warranty and identifies the applicable product; or (4) maintaining a warranty binder or series of binders with copies of the warranties for the products sold in each department in which any consumer product with a written warranty is offered for sale. Warranty binders must be indexed, properly titled, kept up to date, and located to provide easy access for consumers. Sellers using the binder option must either keep the binders in plain view or display signs telling consumers how to find the binders. 16 C.F.R., § 702.3 (1978).

[73] 15 U.S.C. § 2302 (1976).

[74] *Id.*

[75] 15 U.S.C. § 2308 (1976).

[76] This "judicial consumer movement" also found expression in areas not governed by the "goods" definition of the U.C.C. Both service contracts and contracts involving real prop-

sumer under State law or any other Federal law."[77] Under the Uniform Commercial Code, an implied warranty could be modified or excluded by a written warranty.[78] The Magnuson-Moss Warranty Act states in pertinent part:

> (a) No supplier may disclaim or modify . . . any implied warranty to a consumer with respect to a consumer product if (1) such supplier makes any written warranty to the consumer with respect to such product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.
> (b) For purposes of this chapter . . . implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.[79]

The Senate report indicates that the purpose of the disclaimer section is to eliminate the practice of giving express warranties while disclaiming implied

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erty have come under the court's analogously applied warranty of merchantability doctrine. giving effect to judicially created doctrines of implied warranty of workmanlike performance and the implied warranty of habitation.

Greenfield, *Consumer Protection in Service Transactions—Implied Warranties and Strict Liability in Tort*, 4 UTAH L. REV. 661, 674 (1974).

[77] 15 U.S.C. § 2311(b)(1) (1976).

[78] U.C.C. § 2-316(2).

> Often the manufacturer, in a carefully worded warranty, disclaimed or limited the implied warranties and made little or no tangible express warranties concerning the worthiness of his goods. Indeed, it is the disclaimer section of the U.C.C. and its subsequent abuse of the consumer purchaser that so concerned those members of Congress who advocated the passage of Magnuson-Moss.

Schmitt and Kovac, *Magnuson-Moss v. State Protective Consumer Legislation: The Validity of a Stricter State Standard of Warranty Protection*. 30 ARK. L. REV. 21, 24 (1976).

[79] 15 U.S.C. § 2308 (1976).

> With respect to the Uniform Commercial Code provisions allowing disclaimer of implied warranties, section 108 of the Act and its legislative history demonstrate congressional intent to supersede inconsistent state provisions. (citation omitted) In addition, section 111(c) (citation omitted) precludes state labeling or disclosure requirements that, if within the scope of the Act, are not identical to the requirements of the Act and do not have prior approval of the Federal Trade Commission. Unfortunately, confusion arises because section 111(b)(1) specifically preserves consumer rights and remedies under state law. Because the effect of this section is not clear, the preemption problem underlies much of the Act. . . .

Note, *Warranties—Uniform Commercial Code—Effects of Federal Warranty Law on Washington U.C.C. Provision—Magnuson-Moss Warranty Act*, 15 U.S.C. §§ 2301-2312 (Supp. V. 1975), 52 WASH. L. REV. 395 (1977).

warranties.[80] The report went on to say that this practice often has the effect of limiting the rights of the consumer rather than expanding them as the consumer might have been led to believe.[81]

The Magnuson-Moss Act has not reduced or modified the remedies previously available to the new home buyer. The remedies which pre-date this Act include: common law protection based on the theory of implied warranties of fitness and habitability, additional protections available under the Uniform Commercial Code concerning sale of goods, and the expanded protection under the Consumer Product Safety Act. Added to this list, the Magnuson-Moss Warranty/Federal Trade Commission Act provides protection in the area of written warranties.

The Voluntary Home Owners Warranty Program

As previously shown, in recent times the judiciary has been responsive and innovative in dealing with the plight of the new home purchaser. Aware of this judicial trend, the National Association of Home Builders[82] developed a voluntary home owners warranty program.[83] The National Association had three major goals:

1) to improve the image of the home building industry;[84]
2) to provide a means whereby unwarranted claims against a home builder could be settled without litigation while reducing the damage to the reputation of the home builders against whom the unwarranted suit was filed;[85] and
3) to ward off undesirable legislation regarding warranties or quality standards.[86]

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[80] *See* H.R. REP. NO. 1107, 93d Cong., 2d Sess. 40, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702, 7721-22.

[81] *Id.*

[82] Home Owners Warranty Corp., *Application Booklet* (1978). "HOW is administered by the Home Owners Warranty Corporation, a subsidiary of the National Association of Home Builders." *Id.* at 8. The National Association has a membership of 84,000 home builders. *Id.*

[83] *Id.* The national organization licenses local warranty councils on a state or metropolitan area basis, which operate within the guidelines established by the National Council. The local councils enroll home builders whose financial standing, technical ability, and ethical reputation meet the requirements of the National Council. Once a builder is registered with a local council, he is committed to provide the warranty on all eligible housing units he constructs. *Id.*

[84] *Id.* at 11.

[85] *Id.* at 9,11.

[86] *See* notes 99-101 *infra* and accompanying text.

In general, the Home Owners Warranty Program provides the home buyer with a written warranty from the builder, insurance which backs the builder's warranty, and extended insurance coverage on major structural defects. HOW provides a one year warranty against defects in materials and workmanship, a two year warranty against defects in major mechanical systems and a ten year warranty against major structural defects.[87] More specifically, for the first year the builder warrants against defects caused by faulty workmanship or faulty materials due to non-compliance with HOW's approved standards.[88] "The builder's warranty continues for the second year to protect against defects in the wiring, piping and ductwork in the home's electrical, plumbing, heating and cooling systems and against major construction defects."[89]

The Insurance Company of North America's Underwriters Insurance Company backs the builder's written warranty for the first two years.[90] If the builder cannot or will not perform his HOW warranty obligation, the insurance carrier assumes the responsibility to either repair or replace the defects in the home due to non-compliance with HOW standards or to pay to the buyer the cost of repairing or replacing the defects.[91] During the third

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[87] Home Owners Warranty Corp., *Application Booklet* 5-6 (1978).

[88] Home Owners Warranty Corp., *Approved Standards* (1977).

Compliance with these standards is the basis for acceptance of the Home under the Warranty Program and issuance of the Certificate of Participation in the Home Warranty Insurance Policy.

These standards consist of two parts:

(a) Those standards regulating the structural, mechanical-plumbing, and electrical systems which apply during the applicable Initial Warranty Period, and

(b) Quality Standards, which establish minimum performance standards relating to specific deficiencies which apply during the applicable Initial Warranty Period.

If there is any conflict between (a) and (b) above, the higher standard shall govern.

Id. at 1.

The most frequent defects of concern to the home buyer have been enumerated in the Quality Standards. The Quality Standards are expressed in terms of performance standards. Failure to comply with the performance standard calls for corrective action by the builder. The Standards are three fold:

1. *Possible Deficiency*—a brief statement in simple terms of the problems to be considered.
2. *Performance Standard*—a performance level relating to a specific deficiency.
3. *Builders Responsibility*—a statement of the corrective action required of the Builder to repair the deficiency or any other damage resulting from making the required repair.

Id. at 5. Quality Standards are listed by category. In part, they are: site work, concrete, masonry, wood and plastics, thermal and moisture protection, doors and windows, finishes, specialties (louvers and vents), equipment, mechanical, and electrical. *Id.* at 6-17.

[89] Home Owners Warranty Corp., *Application Booklet* 5 (1978). Major construction defect is defined as actual damage to the load-bearing portion of the home including damage due to subsidence, expansion, or lateral movement of the soil, but excluding flood and earthquake. *Id.* at 34.

[90] *Id.* at 5.

[91] *Id.* at 21.

through tenth years of the Program, the home is insured directly by the insurance carrier against major construction defects.[92] The insurance protection provided to the buyer is evidenced by a written policy forwarded to the buyer subsequent to closing.[93]

The home buyer has an obligation under the agreement to keep and maintain the home in good repair and condition,[94] and comply with manufacturers' warranty requirements as to equipment, appliances, and fixtures.[95] During the first two years of the Program, the buyer must report defects to the builder in writing as soon as practical after they appear.[96] Thereafter, defects must be reported to the local Home Owners Warranty Corporation.[97] HOW is administered throughout the state by the Home Owners Warranty Corporation of New Jersey.[98]

There exists under the HOW Program a three-tier system for handling disagreements over claimed defects in the home during the first two years of coverage. First, if the buyer submits a written complaint to the builder which is not resolved to the buyer's satisfaction, the buyer advises the Home Owners Warranty Corporation of New Jersey.[99] HOW representatives will then attempt to establish or re-establish communications with the builder.[100] Second, the buyer can request that HOW arrange for conciliation[101] through the use of a neutral party. The goal of this conciliator is to clarify the issues and

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[92] *Id.* at 6.

[93] *Id.*

[94] *Id.* at 19.

[95] *Id.* The builder warrants equipment, appliances, and fixtures for the duration of the manufacturer's warranty but not exceeding one year. *Id.* at 18.

[96] *Id.* at 20.

[97] *Id.* at 21.

[98] *Id.* at 8. As of Feb., 1979, there were over 65 builders in the New Jersey HOW Program covering over 9,000 New Jersey homes. Telephone interview with Michael Brown, Home Owners Corp. of N.J. (April 2, 1979).

All builders registering with HOW pay an initial registration fee and an annual re-registration fee, but there is no charge to the home buyer for the insurance backed warranty protection. Home Owners Warranty Corp., *Application Booklet* 4 (1978). Builder members who fail to meet registration standards at the time of annual re-registration or who have not complied with their obligations under the HOW Program, may have their membership suspended and/or terminated although HOW protection remains for homes already enrolled in the program by the builder. *Id.* at 11.

[99] Home Owners Warranty Corp., *Application Booklet* 6 (1978).

[100] *Id.* If the homeowner contacts HOW but had not as yet notified the builder of the defect, the homeowner will be asked by HOW to notify the builder and advise him of the problem. If the homeowner is unable to contact the builder, then HOW will do so.

[101] *Id.* at 7. Although Magnuson-Moss Warranty/Federal Trade Commission Act, 15 U.S.C. §§ 2301-2312 (1976) prohibits the use of conciliation as part of a dispute settlement procedure, the HOW Program received an exemption from this aspect of the law. Home Owners Warranty Corp., *Application Booklet* 10 (1978).

help the parties reach an accord. Third, if conciliation fails, either party can request that the dispute be submitted to arbitration through the American Arbitration Association.[102]

Through years three to ten of the program, the buyer makes a claim for major structural defects to HOW's insurance fund.[103] If the buyer or insurer is dissatisfied with HOW's determination concerning the claim, either may request arbitration under the procedure described for the first two years.[104]

The Home Owners Warranty Program was a step forward by private industry to protect the new home buyer. Federal and state warranty requirements fail to address two major problems: that the builder could put the consumer through a long and costly court battle before making payment on a legitimate claim, and that a claim may be uncollectable if the builder goes out of business or is incapable of paying a large claim or a series of claims.[105] The HOW Program through its dispute mechanisms and insurance provision protects the purchaser of a home covered by its program.

The New Home Warranty and Builders' Registration Act

Consumerism and public pressure helped establish the Home Owners Warranty Program in New Jersey. Consumerism, while showing its strength nationwide, received court support in New Jersey through decisions like *Karagheusian*[106] and *Schipper*.[107] Public pressure was applied in the state's legislative forums. Prior to the adoption of HOW, many municipalities passed builder registration ordinances[108] or required builders to post security on new homes from twelve to eighteen months.[109] The prospect of having 567 different ordinances with which to comply sent the New Jersey Builders Association looking for an alternative.

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[102] *Id.* at 7, 11. (Hearing is usually held at home site to allow arbitrator to review all matters in dispute).

[103] *Id.* at 21.

[104] *Id.* As to all homes covered by the HOW Program prior to May, 1977, if the homeowner requests conciliation, he pays a deposit of $25 which is refunded if the complaint is found to have merit. A $75 deposit must accompany a request for arbitration but this fee is refunded unless the arbitrator finds the claim wholly without merit. To all homes covered after May, 1977, no charge may be required. 40 Fed. Reg. 60175, 16 C.F.R. § 703 (1975) authorized by the Magnuson-Moss Warranty/Federal Trade Commission Act, 15 U.S.C. §§ 2301-2312 (1976).

[105] Note, *Home Owners Warranty Program: An Initial Analysis*, 28 STAN. U. L. REV. 357, 369-70 (1976).

[106] Santor v. A.M. Karagheusian, 44 N.J. 52, 207 A.2d 305 (1965).

[107] Schipper v. Levitt, 44 N.J. 70, 207 A.2d 314 (1965).

[108] *See, e.g.*, Oakland, N.J., Ordinance 75, Code 643 (Sept. 16, 1975).

[109] *See, e.g.*, East Brunswick, N.J., Ordinance 73-61H (June 25, 1973).

While the builders set out in their search, the New Jersey State Assembly found itself considering far-reaching and divergent solutions to the warranty problems.[110] Spurred on by these varied attempts, the New Jersey builders in conjunction with the National Association of Home Builders scoured the United States for palatable plans. Finding no plan, they looked to Great Britain and found a program which met their needs.[111] The Greater Home Warranty Council of Great Britain pre-screened builders for technical competence and fairness,[112] while providing the homes constructed by these builders with warranty coverage and insurance backing.[113]

Viewed against this background, the New Jersey home builders accepted the HOW Program, outlined previously,[114] as the only realistic alternative to the legislative proposals bandied about. The New Jersey State Legislature stalled action on the pending warranty and security bills while monitoring the successful and new voluntary program.[115]

In 1976, "The New Home Warranty and Builders' Registration Act" was introduced in the New Jersey State Assembly[116] and was approved nearly a year later in March, 1978.[117] It is modeled, in large part, after the voluntary HOW Program.

The Act requires that all builders constructing new homes in New Jersey register with the State Department of Community Affairs.[118] The Department must be shown proof of participation in a "security fund"[119] or in an approved "alternative . . . program."[120] The builder opting to join the state plan participates in a security fund established by the state.[121] The

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[110] *See, e.g.*, A. 805, 196th N.J. Legis., 1st Sess. (2d Official Copy Reprint 1974) (requiring builder registration, security fund contributions, and a mandated warranty); A. 125, 196th N.J. Legis., 1st Sess. (2d Official Copy Reprint 1974) (establishing a real estate guarantee fund); and A. 962, 196th N.J. Legis., 1st Sess. (1974) (requiring builder registration and the posting of a bond or security certificate).

[111] Office of Int'l Affairs, U.S. Dept. of Housing & Urban Development, *On Insured Building Warranty Plan for Home Buyers . . . . British Experience and An American Proposal* (1974). "The British program . . . is considered the best and most comprehensive housing warranty program now in operation." *Id.* at 3.

[112] *Id.*

[113] *Id.*

[114] *See* notes 82-105 *supra* and accompanying text.

[115] Home Owners Warranty Corp., *1978 Annual Report*. "Of all the cases submitted to [HOW] for conciliation [the informal mechanism], almost 80% have been resolved at this stage [proving] that there are alternatives to the courts." *Id.* at 6.

[116] A. 1892, 198th N.J. Legis., 1st Sess. (2d Official Copy Reprint 1977).

[117] N.J. STAT. ANN. §§ 46:3B-1 to -12 (West Supp. 1978-1979).

[118] N.J. STAT. ANN. §§ 46:3B-5, -2 (West Supp. 1978-1979).

[119] N.J. STAT. ANN. § 46:3B-5 (West Supp. 1978-1979).

[120] *Id.* (HOW is an example of an alternative program).

[121] N.J. STAT. ANN. § 46:3B-7a (West Supp. 1978-1979).

purpose of the security fund is to protect the consumer from the builder who, after exhaustive administrative remedies, "is unable or wilfully refuses to correct such deficiences. [In this event] an amount sufficient to cure the problem shall be paid from the fund to the [home] owner."[122]

Registration is not automatic upon application by the builder.[123] The commissioner may "deny, suspend or revoke any certificate of registration."[124] Registation may be refused for any of the specifically stated reasons[125] and for generally violating the statute or any regulation adopted pursuant to the statute.[126]

There are two fee schedules created under the statute.[127] The first concerns registration which must be paid by all builders constructing new homes within New Jersey.[128] The other implements the "new home warranty security fund"[129] which is paid only if the builder is joining the state warranty program.[130]

Each builder in New Jersey, however, is required to participate in either the state warranty fund or an approved alternate security fund.[131] If a builder is not participating in a private plan, that builder will be required to participate in the state plan.[132]

Alternative home warranty programs must be reviewed and approved by the Commissioner of Insurance[133] and he "may establish and charge reasonable fees to cover the costs incurred in reviewing and approving such applications."[134] Alternative plans are excluded, for the most part, from com-

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[122] N.J. STAT. ANN. § 46:3B-7c (West Supp. 1978-1979).

[123] N.J. STAT. ANN. § 46:3B-6b (West Supp. 1978-1979).

[124] *Id.* The commissioner's action must fall within the ambit of the Administrative Procedures Act. N.J. STAT. ANN. §§ 52:14B-1 *to* -13 (West Supp. 1978-1979).

[125] N.J. STAT. ANN. §§ 46:3B-6b(1) to (5) (West Supp. 1978-1979). These violations include wilful misstatement of material fact upon application or renewal and wilful fraud in occupational practices. *Id.*

[126] N.J. STAT. ANN. § 46:3B-6b(6) (West Supp. 1978-1979).

[127] N.J. STAT. ANN. § 46:3B-5 (West Supp. 1978-1979).

[128] *Id.* "Each application shall be accompanied by a reasonable fee, prescribed by the commissioner. . . ." *Id.* (Under the third draft of proposed regulations empowered by Executive Order No. 66 (1978) [hereinafter cited as REG.], the registration fee is a non-returnable one of $200. REG. § 5:24-2.2(a)1. (Jan. 1, 1979)).

[129] N.J. STAT. ANN. § 46:3B-7a (West Supp. 1978-1979).

[130] N.J. STAT. ANN. §§ 46:3B-5, -8(1) (West Supp. 1978-1979). (Presently, the contribution to the state plan is .4 of 1% of the purchase price of each home or the fair market value of the home upon completion. REG. § 5:24-5.4(1) (Jan. 1, 1979)).

[131] N.J. STAT. ANN. § 46:3B-5 (West Supp. 1978-1979).

[132] REG. § 5:24-5.3 (Jan. 1, 1979).

[133] N.J. STAT. ANN. § 46:3B-8 (West Supp. 1978-1979).

[134] *Id.* (REG. § 5:24-4.3(b)8 (Jan. 1, 1979) sets the reviewing fee at $1,000).

pliance with "any rules adopted by the Commissioner of Community Affairs."[135]

Failure to register and participate in the state fund or an alternative program will subject the offender to a penalty of up to $2,000 for each offense.[136] Enforcement and collection is left in the hands of the Commissioner of Community Affairs.[137]

The builders were relieved by the provision which preempted any municipal ordinances and regulations concerning builder licensing and registration,[138] thus protecting them from the plethora of controls proposed or enacted by the municipalities.[139]

The warranties established under the statute, in pertinent part, state:

> (1) One year from and after the warranty date the dwelling place shall be free from defects caused by faulty workmanship and defective materials due to noncompliance with the building standards. . . .[140]
>
> (2) Two years from and after the warranty date the dwelling shall be free from defects caused by faulty installation of plumbing, electrical, heating and cooling delivery systems; however in the case of appliances, no warranty shall exceed the length and scope of the warranty offered by the manufacturer.[141]
>
> (3) Ten years from and after the warranty date [the dwelling shall be free from] major construction defects.[142]

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[135] N.J. STAT. ANN. § 46:3B-8(2) (West Supp. 1978-1979).

[136] N.J. STAT. ANN. § 46:3B-12 (West Supp. 1978-1979).

[137] *Id.*

[138] N.J. STAT. ANN. § 46:3B-11 (West Supp. 1978-1979).

[139] *See* notes 108-109 *supra* and accompanying text.

[140] N.J. STAT. ANN. § 46:3B-3b(1) (West Supp. 1978-1979). These standards are to be issued by the commissioner pursuant to N.J. STAT. ANN. § 46:3B-3a (West Supp. 1978-1979).

[141] N.J. STAT. ANN. § 46:3B-3b(2) (West Supp. 1978-1979). If the manufacturer's warranty extends up to two years, the builder, rather than the manufacturer, retains responsibility under the statute. *Id.* (This safeguards against the possibility of a bankrupt or out-of-business manufacturer whose warranty has not terminated).

[142] N.J. STAT. ANN. § 46:3B-3b(3) (West Supp. 1978-1979). From the third to the tenth year, the builder is responsible for all major construction defects. *Id.* "Prior to making a claim against the fund for defects covered by the warranty, the owner shall notify the builder of such defects and allow reasonable time for repair." N.J. STAT. ANN. § 46:3B-7c (West Supp. 1978-1979). *But see* Home Owners Warranty Corp., *Application Booklet* (1978) where the insurance plan, not the builder, insures the home buyer against major structural defects in the third through the tenth years. Major construction defect means any actual damage to the load-bearing portion of the home including damage due to subsidence, expansion or lateral movements of the soil. REG. § 5:24-1.3(m) (Jan. 1, 1979).

Warranties are normally a desirable entity but the consumer often runs into problems when attempting to enforce them. Under the new Act, there is a specific mechanism for enforcement.[143] Initially, the owner notifies the builder in writing of the defect in the hope of an informal reconciliation.[144] Failing in that, the parties may agree to arbitration with an arbitrator designated by the Department of Community Affairs who will issue a binding decision.[145] Where the parties cannot agree to binding arbitration, the department will provide a hearing[146] in accordance with the New Jersey Administrative Procedures Act.[147] Once the owner initates the dispute settling mechanism, the owner is barred from the use of all other legal remedies until the dispute settling mechanism is exhausted.[148]

The consumer is at all times protected from the builder who is unwilling or unable to make the designated corrections.[149] When the builder fails to perform, the state fund provides the money to make the repair.[150] This award, however, will at no time exceed "the purchase price of the home in the first good faith sale . . . or the fair market value on the home on its completion date."[151]

Should the consumer elect not to use the dispute settling mechanism provided, the strict and implied warranty options[152] are still available. Should these mechanisms be chosen, the arbitrator or conciliator has quality standards established by the commissioner[153] to be used in determining responsibility for defects.[154] The hope is to provide uniformity and fairness in result.

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[143] N.J. STAT. ANN. § 46:3B-7c (West Supp. 1978-1979).

[144] *Id.* The builder must respond within 30 days. REG. § 5:24-5.5(b)2 (Jan. 1, 1979).

[145] REG. § 5:24-5.5(e)1(a) (Jan. 1, 1979). (The owner must make himself and his home accessible to the arbitrator within 15 days of filing. REG. § 5:24-5.5(b)(4) (Jan. 1, 1979).

[146] REG. §24-5.5(e)1(b) (Jan. 1, 1979).

[147] N.J. STAT. ANN. §§ 52:14B-1 to -13 (West Supp. 1978-1979). (An appeal from this decision would be taken to the Appellate Division of the New Jersey State Courts. N.J. Ct. R. 2:2-3(a)).

[148] N.J. STAT. ANN. § 46:3B-9 (West Supp. 1978-1979).

[149] N.J. STAT. ANN. § 46:3B-7a (West Supp. 1978-1979).

[150] *Id.*

[151] N.J. STAT. ANN. § 46:3B-7c (West Supp. 1978-1979). *See* Home Owners Warranty Corp., *Application Booklet* 5 (1978) where the warranties are underwritten by an insurance company.

[152] *See* notes 21-26 *supra* and accompanying text.

[153] REG. § 5:24-3.4 (Jan. 1, 1979).

[154] *See, e.g.*, REG. 5:24-3.4(B)1(V) (Jan. 1, 1979) which reads:

> Possible Deficiency: Cracks in attached patios. Performance Standard: Cracks in excess of ¼ inch width or in vertical displacement are considered excessive. Builders Responsibility: Builder to repair as required.

The warranties can be extended to buildings developed as cooperatives and condominiums[155] and to dwellings of two-families.[156] But in all cases, the warranties exclude defects in outbuildings[157] or any improvements not part of the home.[158] Personal injury is specifically excluded under the regulations[159] as is damage to personal property,[160] but consumers may still maintain court actions using implied or strict liability standards.[161] Further exclusions from warranty include negligence[162] or omissions[163] on the part of anyone except the builder. Accidental loss from fire, explosions, and the like[164] and acts of God[165] also are not warranted. Soil movement, however, is warranted,[166] while insect damage is not.[167] All warranties are cancelled if the damage or loss is caused while the home is used for non-residential purposes.[168]

The specificity of the Act, coupled with the regulations, is its strength. There is a lack of certainty as to the effect of the Magnuson-Moss Warranty/Federal Trade Commission Act on new homes;[169] the New Home Warranty and Builders' Registration Act provides certainty. Although the case law designated implied warranties and strict liability remedies, the average consumer is not cognizant of their existence. Further, the consumer often is confronted with defects in the housing which cost little to repair, while the litigation expense greatly outweighs the price of the cure to the defect. The conclusion is apparent: these causes of action were ineffective for home owners. The New Jersey statute, then, acts as an equalizer bringing the home owner to the level of the builder.

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[155] REG. § 5:24-3.1(c) (Jan. 1, 1979). Only common elements of these structures are covered by warranty. *Id.*

[156] REG. § 5:24-3.1(d) (Jan. 1, 1979). Warranties are the same as those extended to the single family dwelling except that "the warranty shall not cover quality standard defects." *Id.*

[157] REG. § 5:24-3.3(c)1 (Jan. 1, 1979). Outbuildings under warranty are buildings containing plumbing, electrical, heating or cooling systems serving the home, and covered and retaining walls necessary for the home's structure and stability. *Id.*

[158] *Id.* These improvements include swimming pools, driveways, patios, landscaping, and fences. *Id.*

[159] REG. § 5:24-3.3(c)2 (Jan. 1, 1979).

[160] *Id.*

[161] *See* notes 20-38 *supra* and accompanying text.

[162] REG. § 5:24-3.3(c)3i (Jan. 1, 1979).

[163] REG. § 5:24-3.3(c)3ii (Jan. 1, 1979).

[164] REG. § 5:24-3.3(c)6 (Jan. 1, 1979).

[165] *Id.*

[166] *Id.*

[167] REG. § 5:24-3.3(c)7 (Jan. 1, 1979).

[168] REG. § 5:24-3.3(c)8 (Jan. 1, 1979).

[169] *See* notes 63-65 *supra* and accompanying text.

The Act, which will not take effect until the final draft of regulations is promulgated,[170] was found complementary to the implied warranties and strict liabilities in the recent Supreme Court of New Jersey opinion, *McDonald v. Mianicki*.[171] The court gave its tacit approval to the statute, calling it a "commendable program."[172]

The statute, then, is an example of the legislative process functioning at its best. It was honed from opposing view points, shaped with modern consumer case law, and implemented after a period of observation and experimentation. Thus it has an excellent chance of success.

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[170] N.J. STAT. ANN. § 46:3B-3a (West Supp. 1978-1979).

[171] 79 N.J. 275, 398 A.2d 1283 (1978).

[172] *Id.* at 287, 398 A.2d at 1289.